(16)

IN THE

Supreme Court of the United States

October Term, 1942.

No. 1038

OSKAR TIEDEMANN and ESTONIAN STATE STEAMSHIP LINE,
Petitioners,

vs.

ESTODURAS STEAMSHIP COMPANY, INC., Claimant of the Steamship "FLORIDA" (formerly the "SIGNE").

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Oskar Tiedemann and Estonian State Steamship Line, petitioners, prays that a writ of certiorari issue to the Circuit Court of Appeals for the Fifth Circuit in the above entitled action, and respectfully shows:

Jurisdiction

This is a suit in admiralty brought by your petitioners as libelants in the United States District Court for the Eastern District of Louisiana, New Orleans Division.

Libelants seek possession of an Estonian ship, the SIGNE (renamed the FLORIDA) which was subjected to decrees of Estonia S.S.R. in July and October 1940 nationalizing the Merchant Fleet of that country. Libelants claim under such decrees. The libels were dismissed by the Court below. This petition seeks a review of the decision in the Circuit Court of Appeals for the Fifth Circuit dismissing such libels (opinion filed and judgment entered on February 20th, 1943, Case No. 10288, printed in 133, Fed. 2d 719).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (28 U. S. Code 347) and the rules of this Court made pursuant thereto.

A

Summary Statement of the Matter Involved

For almost 900 years, until March 1918, Estonia was a province of Russia. In March 1918, by the Treaty of Brest-Litovsk, Estonia was dismembered from its parent Russia by the Germans. Thereafter the so-called Estonian Republics fell consistently under the influence of Germany, and, after Hitler came to power in 1933, Estonia obediently followed the Nazi pattern by abolishing political parties in 1935. On June 17th, 1940, the brief existence of the Russian Province of Estonia as an independent state came to an end. On that date Estonia was reoccupied by the Russian Army. After its restoration to the mother country on June 17th, 1940, Estonia became again a State of Russia, known as the Estonian Soviet Socialist Republic, herein referred to as Estonia S.S.R.

Under decrees of Estonia S.S.R. dated July 28th and October 8th, 1940, the Merchant Fleet of Estonia was nationalized and compensation was ordered to the former owners[1].

Estonia S.S.R. was the *de facto* government of Estonia at all times subsequent to June 17, 1940, and relevant to this proceeding.[2]

The intervening libelant herein, Estonian State Steamship Line is a corporation of the U. S. S. R. organized on October 25, 1940, to take title to the S. S. FLORIDA, among other ships, pursuant to decrees of the *de facto* Estonian government as above[3].

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[1] Respondent's Exhibits "7", Rec., p. 308; "6", Rec., p. 305; "5", Rec., p. 300; Libelants' Exhibits "A", Rec., p. 254; "B", Rec., p. 255; "C", Rec., p. 258; "D", Rec., p. 263 and "E", Rec., p. 267, the last exhibit being an excerpt from Article 1117 of the Constitution of the Estonian S. S. R. which decrees that "Water * * * transport * * * are state property, that is belong to the whole people"). Libelants' Ex. "A", Par. 2, Rec., p. 255).

The ship here involved is one of those affected by such decrees.

[2] Conceded by respondent Estoduras in its answer, Pars. 11, 12, 13 and 22, Rec., p. 27, and in its answer to the intervening libel, Pars. 6, 7 and 8, Rec., pp. 56 and 57; and found as a fact by the Court below; Findings of Fact, Pars. 2, 3 and 5, Rec., p. 377, from which findings no appeal was taken.

[3] Decree dated October 25, 1940 of the Council of People's Commissars of the U. S. S. R. No. 2131, and further decree of October 28, 1940, by the People's Commissariat of the U. S. S. R. Maritime Fleet, Rec., pp. 255, 258 and 263 and Libelants' Exhibit "A", Rec., p. 254.

The State Department of the United States did not politically recognize the occupation of Estonia by the U. S. S. R. The U. S. S. R., however, and Estonia S.S.R. undeniably constituted the *de facto* government of Estonia during the period relevant to this case (June 17th to October 25th, 1940)[4].

The Master of the ship in this case, on the advice of respondent Kaiv, who had been consul in the United States of the extinguished Estonian government, refused to surrender this ship to libelants who took title under the Estonian S.S.R. decrees of July 28th and October 8th, 1940.

This libel was thereupon brought by libelant and intervening libelant under a power of attorney given by both to Charles Recht. The original libelant was Oskar Tiedemann, managing director of the FLORIDA prior to the decrees of July 28th and October 8th, 1940, as above[5].

Intervening libel was filed on behalf of the Estonian State Steamship Line, a corporation of the U. S. S. R. under power of attorney to the same Charles Recht for the same purpose on behalf of the Estonian State Steamship Line

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[4] Conceded by respondent Estoduras in its answer, Pars. 11, 12, 13 and 22, Rec., p. 27, and in its answer to the intervening libel, Pars. 6, 7, and 8, Rec., pp. 56 and 57; and found as a fact by the Court below; Findings of Fact, Pars. 2, 3 and 5, Rec., p. 377, from which findings no appeal was taken.

[5] Libelants' Exhibit "R", Rec., p. 269, and radiogram of December 18th, 1940 confirmed by radiogram of June 7th, 1941, Libelants' Exhibit "T", signature of Tiedemann notarized, Rec., p. 271.

which took title under the decrees above referred to of the *de facto* Estonian government[6].

The Tiedemann libel was filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division, December 21, 1940,[7] and the intervening libel of Estonian State Steamship Line was filed on June 12, 1941[8]. Libelants seek their remedy *in personam* for damages as well as *in rem*[9].

The pre-1940 government of Estonia has not been a *de facto* government nor even a government in exile since June 17, 1940.

The respondent, Estoduras Steamship Company, Inc. is a dummy corporation representing no investment of capital and holding no assets, except the ship here involved. It was organized by respondent Kaiv[10] and the registry of this ship has been changed to Panama by him. Kaiv was Counsel General in the United States of the Estonian Government extinguished on June 17, 1940. This government has had no existence since that time, being neither a *de facto* government nor a government in exile.

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[6] Libelants' Exhibit "F", Rec., p. 268. This power of attorney to Charles Recht authorizing him to file libel on behalf of Estonian State Steamship Line, has been confirmed by written document authenticated by the United States Consulate at Moscow, under date of March 11th, 1941, and added to the record by stipulation after the record was printed. This document is in the file of the case.

[7] Rec., p. 2.

[8] Rec., p. 52.

[9] Rec., p. 5, Sec. IX of libel, paragraph 4.

[10] Rec., pp. 236 to 241.

The trial of this action was had before Hon. A. J. Caillouet on June 26th and June 27th, 1941. The libel was dismissed.

Findings of fact and conclusions of law were made on July 22nd, 1941, and a decree dismissing the libel was entered on July 30th, 1941. An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit and the Judgment of the District Court was affirmed [133 Fed. 2d 719—(1943)].

B

Statement Particularly Disclosing the Basis Upon Which it is Contended That This Court Has Jurisdiction to Review the Judgment in Question, and the Questions Presented.

Libelant-appellant urges that the Circuit Court of Appeals erred:

1. Because the decision below is in direct conflict with the decision of the Circuit Court of Appeals of the Third Circuit in the same matter in the case of *The Denny,* 127 Fed. (2d) 404 (1942). In that case the Circuit Court of Appeals of the Third Circuit, on a state of facts legally identical with the instant case, but involving a Lithuanian ship, upheld in full libelant's claim to such ship, whereas this Court dismisses such libel.

2. Because the decision of the Court below departs from the accepted and usual course of judicial proceedings by establishing judicial review in United States Courts of the decrees of a *de facto* foreign government affecting only the personal and property rights of its own citizens.

3. Because the decision of the Court below is in conflict with all applicable decisions of this Court which hold that the civil decrees of a *de facto* government affecting personal and property rights are effective regardless of the political recognition or non-recognition of such *de facto* government.

4. Because the Court below has decided an important question of Federal Law which has not been, but should be, decided by this Court, in its refusal to grant letters rogatory for the procurement of relevant testimony abroad as requested by the libelants. The United States has a compact with the Soviet Union providing for the taking of such testimony under such circumstances. Libelants contend that they possess a Constitutional right under the Fifth Amendment for the procurement of such testimony, and assert that this important question of Federal Law has not been settled by this Court.

5. Because the decision of the Court below is in conflict with an applicable decision of this Court insofar as it allows the consul of a foreign government, in the absence of specific powers given to him by competent authority, to receive the proceeds of property belonging to his nationals.

6. Because the decision of the Court below, in allowing respondent Kaiv to retain possession of the FLORIDA "in trust" has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Respondent Kaiv is an adverse claimant of the ship and is, therefore, disqualified from serving as trustee thereof under deci-

sions of this Court and under the uniformly established practice of courts of equity for almost one hundred years.

7. Because the decision of the Court below has found that libelant Tiedemann signed his power of attorney in this case under duress, though there is nowhere in the record any legally admissible evidence whatsoever of such duress. The decision below so far departs from accepted and usual course of judicial proceedings, therefore, as to call for an exercise of this Court's power of supervision.

8. Because the Court below is in error in stating that "the record lacks clear and convincing proof of ownership by libelants * * *." The absolute proof of ownership of this ship in libelants was contained in the record in a series of decrees and orders heretofore cited in the state of facts. The Court below has so far departed, therefore, in this respect from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

9. Because the judicial treatment to be accorded the decrees of the Baltic States of the Soviet Union from and after June 17th, 1940, to date, involves a most important question of Federal Law which has not been, but should be, settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, in case No. 10288 (133 Fed. 2d 719), commanding that Court to certify and to send to this Court for its review and determination, on

a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case of Oskar Tiedemann and Estonian State Steamship Line, appellants, against Estoduras Steamship Company, Inc., claimant of the Steamship FLORIDA (formerly the SIGNE), appellee, and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises, as this Honorable Court may seem meet and just.

And your Petitioner will ever pray.

Dated, New York, N. Y., May 17, 1943.

OSKAR TIEDEMANN
and
ESTONIAN STATE STEAMSHIP LINE,
Petitioners.

By CHARLES RECHT,
Counsel.

Certificate

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for purposes of delay.

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IN THE

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No.....

OSKAR TIEDEMANN and ESTONIAN STATE STEAMSHIP LINE,

Petitioners,

vs.

ESTODURAS STEAMSHIP COMPANY, INC., Claimant of the Steamship "FLORIDA" (formerly the "SIGNE").

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

POINT I

The decision below is in direct conflict with that of the Circuit Court of Appeals of the Third Circuit in the case of *The Denny*, 127 Fed. 2d 404 (1942).

The decision below is in direct conflict with that of the Circuit Court of Appeals of the Third Circuit in THE DENNY, 127 Fed. 2d 404 (C. C. A. 3rd—1942). In that case

the Circuit Court of Appeals of the Third Circuit, on a state of facts legally identical with the instant case, upheld in full libelant's claim. The Court therein stated:

> *"We may not ignore the fact that the Soviet Socialist government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled therein. It follows that the respondents may not question in this court the validity of the Lithuanian decrees insofar as concerns their effect upon the interests of the former members of the associations therein or the validity of the powers of attorney executed by the association's officers and offered in this proceeding."* (The Denny, 127 F. [2d] 404 at 410, C. C. A. 3rd [1942].) (Italics ours.)

The Court below, therefore, in refusing to give libelants possession of the FLORIDA is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in THE DENNY, *supra*. Both reason and authority strongly support that decision of THE DENNY as correct, and must persuade this Court to resolve this conflict in the decisions of the two Circuit Courts of Appeals by granting the writ herein, as requested.

POINT II

The decision of the Court below departs from the accepted and usual course of judicial proceedings by establishing judicial review in United States Courts of the acts of a *de facto* foreign government affecting only personal and property rights of its own citizens.

The decision below departs from the accepted and usual course of judicial proceedings by establishing judicial review in the Courts of the United States of an act of a *de facto* foreign government which affected only the property rights of citizens of that country.

This action by the Court below is in direct conflict with the decision of this Court in *U. S.* v. *Belmont*, 301 U. S. 324 (1937), where this Court said:

> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled" (p. 332).

Judicial review of executive and legislative acts is circumspectly exercised even in regard to our own coordinate branches of government. That such judicial review should be extended by United States Courts to acts of a foreign *de facto* government, with which we do not even have diplomatic relations, is fantastic. The failure of our State Department to grant political recognition to Estonia, S.S.R., does not expand the authority of United States Courts to review the public acts of that government affect-

ing its own nationals. As this Court has stated in *U. S.* v. *Pink*, 315 U. S. 203 (1942):

> "The conditions for 'enduring friendship' between the nations * * * are not likely to flourish where contrary to national policy a lingering atmosphere of hostility is created * * *" (pp. 232, 233).

The decision in the instant case not only accentuates a "lingering atmosphere of hostility" toward the acts of a State of the Russian government, but announces that such acts will be repudiated and rejected in the United States Courts if for some reason they displease our Courts. It declares judicial warfare on our military ally. For this clear departure from the accepted and usual course of judicial proceedings the judgment of the Court below should be reversed.

POINT III

The decision of the Court below is in conflict with applicable decisions of this Court which hold that the civil decrees of a *de facto* government affecting personal and property rights are effective regardless of political recognition or non-recognition of such government.

The decision below is in conflict with applicable decisions of this Court which hold that the civil decrees of a *de facto* government affecting personal and property rights are effective, regardless of the political recognition or non-recognition of such *de facto* government.

This Court has frequently considered this problem in the past, as in a series of cases arising out of the Civil War.

There the question was raised as to whether personal and property rights established by the *de facto* but politically unrecognized State governments of the South should be judicially recognized after the war. Such acts of the *de facto* governments of the Southern States were uniformly upheld, except where they involved hostile activity towards the United States.

In the leading case of *Texas* v. *White,* 74 U. S. 700 (1869) this Court described some of the acts of a *de facto* government which are recognized as valid with or without diplomatic recognition. These are such for example:

> "* * * as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, *regulating the conveyance and transfer of property, real and personal,* and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government. * * *" (Italics ours.) (p. 733.)

This view was confirmed in:

U. S. v. *The Insurance Companies,* 89 U. S. 99 (1875);
U. S. v. *Rice,* 17 U. S. (4 Wheat) 246 (1819);
Mauran v. *Insurance Company,* 73 U. S. 1 (1867);
Thorington v. *Smith,* 75 U. S. (8 Wall) 1 (1868);
U. S. v. *Thomas,* 82 U. S. (15 Wall) 337 (1812);
Williams v. *Bruffy,* 96 U. S. 176 (1867);
Keith v. *Clark,* 97 U. S. 454 (1878);
Sprott v. *U. S.,* 87 U. S. 459 (1874);
Ford v. *Surget,* 97 U. S. 594 (1878);
Baldy v. *Hunter,* 171 U. S. 388 (1898);

MacLeod v. *U. S.*, 229 U. S. 416, 33 Supreme Court 955 (1913);
U. S. v. *Belmont*, 301 U. S. 324 (1937);
U. S. v. *Pink*, 315 U. S. 203 (1942).

Legal scholars have unanimously reached the same conclusion, after studying the decisions and the factual situation in these matters.

The leading student of this subject, Dean Edward D. Dickinson of the University of California Law School, writing in 22 Mich. Law Review 29 (1923), stated:

> "The recognition of a foreign government or state is exclusively a political question. The existence of a foreign government or state is exclusively a question of fact * * * there appears no good reason at all why in suits between individuals about matters of private right, the courts should not frankly take cognizance of unrecognized *de facto* governments or states, and of their capacity to affect private rights in a great many different ways * * * the situation may become * * * serious if courts feel constrained * * * to ignore what is going on abroad in a rather intricately integrated world."

To the same effect are Am. Journal of Intn'l Law, April, 1925, Vol. XIX, No. 2 (pp. 267, 268), Louis Connick, 34 Yale Law Journal 499 (1925), Osmond Fraenkel, 25 Columbia Law Review 544 (1925), Edwin M. Borchard, 26 Amer. Journal of International Law (1932).

The New York State Court of Appeals has considered this matter twice in deciding the same issue regarding private property rights created under the Russian government, while that government was unrecognized.

That Court said in *Salimoff & Company* v. *Standard Oil Company,* 262 N. Y. 220, 186 N. E. 679 (1933):

> "To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give fictions an air of reality which they do not deserve.
>
> "The Courts cannot create a foreign wrong contrary to the law of the place of the act. The cause of action herein arose where the act of confiscation occurred and it must be governed by the law of Soviet Russia. According to the law of nations it did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to defendants. Such conduct may lead to governmental refusal to recognize Russia as a country with which the United States may have diplomatic dealings. * * * The government may be objectionable in a political sense. It is not unrecognizable as a real governmental power which can give title to property within its limits."

To the same effect is *Wulfsohn* v. *Russian Republic,* 234 N. Y. 372 (1923).

This Court in considering the same question in the recent case of *U. S.* v. *Pink,* 315 U. S. 203 (1942) reiterated its former stand by stating that:

> "No manner of speech can change the central fact that here are moneys which belong to the Russian company and for which the Russian Government has decreed payment to itself."

Under these decisions the opinion of the Court below is in conflict with all applicable decisions of this Court,

in conflict with all legal scholarship in this field, and in conflict with the highest State Court which has considered this question.

POINT IV

The Court below has wrongfully decided an important question of Federal Law which has not been decided by this Court in its refusal to grant letters rogatory for the procurement of relevant testimony abroad as requested by libelants.

The Court below has wrongfully decided an important question of Federal Law which should be, but has not been, decided by this Court. That is, in its refusal to grant letters rogatory (Rec. p. 45) for the taking of testimony of O. Tiedemann, libelant's principal, and managing owner of the ship FLORIDA prior to July 28, 1940 (Libelant's Exhibits "R", "S", "T", Rec. pp. 269, 270, 271).

Without any direct evidence in the record, and on nothing but the hearsay statements of a witness who was an adverse claimant to this ship, the Court below found that the authority of libelants here was "conferred by said Tiedemann when under duress * * *" (Rec. p. 378).

Respondents below were allowed to produce this claim of duress from a witness who was not there and who had no official information regarding the matter (Rec. pp. 128 and 129). On the basis of his non-presence and non-information he gave a very certain picture of intimidation and oppression (Rec. p. 145 *et seq.*).

Libelants sought to answer these hearsay aspersions by the taking of direct testimony under letters rogatory requesting the Supreme Court of the Russian Soviet Federated Socialist Republic to obtain such testimony. The United States has a compact with the Soviet Union providing for the taking of such testimony under such circumstances. (Exchange of notes on November 22, 1935, at Moscow, U. S. S. R. between U. S. Ambassador William C. Bullitt and M. Litvinoff, People's Commissar for Foreign Affairs.)

Lower Federal Courts have indicated that issuance of letters rogatory under such circumstances may be a matter of right (*U. S.* v. *Hoffmann*, 24 Fed. Supp. 847 (1938); *In re*: *National Equipment Company*, 195 Fed. 488, 115 C. C. A. 398, Cert. Den. 225 U. S. 701). There is no determination by this Court on this important question.

POINT V

The decision of the Court below is in conflict with an applicable decision of this Court in so far as it allows the consul of a foreign government, in the absence of specific powers given to him by competent authority, to receive the proceeds of property belonging to his nationals.

The Court below permitted Kaiv, who was the consul of an extinguished government, to receive the proceeds of this property. Such action is in direct conflict with an applicable decision of this Court which has been enforced for more than one hundred and twenty years.

In the *Bello Corrunes*, 6 Wheat 152 (1821) this Court said:

> "Whether the powers of the Vice Consul shall in any instance extend to the right to receive in his national character the proceeds of property libeled and transferred into the registry of the court, is a question resting upon other principles. *In the absence of specific powers given to him by competent authority such a right would certainly not be recognized.*" (Italics ours.) (pp. 168, 169).

POINT VI

The decision of the Court below in allowing an adverse party to retain possession of the *Florida* "in trust" has clearly departed from the accepted and usual course of judicial proceedings by allowing an adverse claimant to act as trustee for a reversionary interest.

The Court below allows respondent Kaiv to retain possession of the FLORIDA, "in trust" for a period of time apparently measured by the duration of the war. Kaiv is an adverse claimant to this ship. To allow him to serve as the "trustee", therefore, is an extreme departure from the accepted and usual course of judicial proceedings and calls for an exercise of this Court's power of supervision.

The Court below states that Kaiv "declared himself trustee of this ship and assumed control of its affairs" (Rec. p. 407). Without comment on the peculiar doctrine that a man may "declare himself trustee", it is enough to state that under the uniform holdings of this Court, and the highest equity Courts of the States, and of the British Empire, an adverse claimant to a property is not a qualified trustee.

Libelant under any theory of this case has a reversionary interest in the FLORIDA. When Estonia S.S.R. is recognized politically by the United States, the title of libelant, Estonian State Steamship Line, will be retroactive, as such recognition "will validate all the actions and conduct of the government so recognized from the commencement of its existence."

> *Oetjen* v. *Central Leather Company,* 246 U. S. 297 (1918). (p. 303.)

The Court below concedes that "the status of Estonia as a nation will be determined by future events" (Rec. p. 408).

The Soviet Union has made it amply clear that the Baltic states are to be restored permanently to the Russian mother country at the conclusion of the war.

As Pravda, a Soviet organ, stated on February 10, 1943:

> "Do there not exist curious persons who are ready to present to the Soviet Union parts of the latter's own territory as, for instance, the Baltic republics? These persons pretend not to know that the basic law of our country—the Constitution of the U.S.S.R.—has fixed the ties between these republics and the other Union Republics, and that the Red Army heroically fights for the honor, independence and integrity of our State." (As reported in the New York Times, Saturday, February 13, 1943.)

It seems amply clear thereby that even under the most unfavorable construction of libelants' position as placed by the Court below, libelants possess a reversionary interest in the FLORIDA now held "in trust" by Kaiv.

That being so, Kaiv is a totally unsatisfactory trustee. Kaiv is an hostile party and an adverse claimant to libelants

who represent a reversionary interest. Though representing a government which abolished political parties in 1935, he sneers at an Estonian election held in 1940 as, "when the Communists oppressed the people in the proclaimed so-called election" (Rec. p. 103).

As this Court stated in *May* v. *May*, 167 U. S. 310 (1896):

> "The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever *such a state of mutual ill-feeling*, growing out of his behavior, exists between the trustees, or between the trustees in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than *that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him*, and although charges of misconduct against him are either not made out, or are greatly exaggerated. * * *" (Italics ours.) (pp. 320, 321.)

See also: *In re*: *Tempest* (1866), 1 Chan. App. 485, 35 L. J. Chan. 632, 14 Law Times 688.

The uniform rule of State Courts is that mutual hostility between the trustee and his beneficiaries unfits the trustee for the performance of his duty. The Supreme Court of Massachusetts stated this succinctly in *Wilson* v. *Wilson*, 145 Mass. 490 (1888), at 493:

> "Everyone instinctively feels that a state of *mutual hostility* between the trustee and such a beneficiary * * * unfits him to a greater or less degree, for the fair execution of the trust." (Italics ours.)

In an even firmer statement of the same policy the Circuit Court of Appeals of the Sixth Circuit, in *Sunday School Union, etc.* v. *Walden,* 121 Fed. 2d 719 (1941) stated:

> "*The presence of friction,* resulting in litigation and bad feeling, even in a case where the trustee's integrity and intelligence of management are above reproach requires removal of the trustee" (pp. 724, 725). (Italics ours.)

The Court below, therefore, has made a clear and violent departure from the accepted and usual course of judicial proceedings in appointing an adverse claimant, Kaiv, to hold this ship "in trust" for the libelants, its likely reversioners, in view of the open hostility between Kaiv and such libelants.

Kaiv is, aside from this, unqualified to serve as trustee of a large fund by reason of his undemonstrated financial ability. Libelant is still painfully reminiscent of the custody exercised by the former Kerensky officials, during the period of 1917 to 1933. These officials retained formal diplomatic status just as does respondent Kaiv in this case, and in 1933 when these claims were finally turned over to the United States Government for the benefit of U. S. creditors, the balances were depleted and the accounts confused.

Kaiv is, therefore, wholly unfit to hold this ship "in trust", both because he is an adverse party and because he is a person of no demonstrated financial responsibility. Such departure from this usual and accepted course of judicial proceedings on the part of the Court below calls for the exercise of this Court's power of supervision.

POINT VII

The finding of the Court below that libelant Tiedemann signed his power of attorney in this case under duress is unsupported by any legally admissible evidence whatsoever.

There is no admissible evidence whatever in the record of this case of duress on libelant Tiedemann. Respondent Kaiv, an adverse party, after admitting that he was not there and had no direct communication with Estonia (Rec. pp. 128 and 129), was allowed to recite in detail in the record evils which his non-presence and non-communication disclosed to him regarding affairs in Estonia as of those dates (Rec. pp. 143 and 145 *et seq.*). Objection was taken to this entire line of testimony (Rec. p. 134). This testimony was acknowledged by the Court below to be hearsay (Rec. p. 130). Yet the Court below states that the evidence "fully supports the finding of the lower Court that he (Tiedemann) was under duress of the Russian authorities when he made and executed the cabled power of attorney * * *" (Rec. pp. 407, 408). The record utterly fails to support such conclusion. The decision below far departs, therefore, from the usual and accepted course of judicial proceedings.

POINT VIII

The Court erred in stating that "the record lacks clear and convincing proof of ownership by libelants * * *."

The record contains the decree under which this ship was nationalized (Libelant's Exhibit A, Rec. p. 254), and the decree of the U. S. S. R. No. 2131, organizing the Estonian State Steamship Line (Libelant's Exhibit B, Rec. p. 255). In the file before the Court is contained the power of attorney, duly authenticated before the American Vice-Consul in Moscow, by which this corporation, holding title under the aforesaid decree, authorized libelant to bring this action. It would be impossible to present any proof more "clear and convincing" on an issue of title or authority. The decision below is based on a clear error, therefore, which requires the issuance of this writ.

POINT IX

The Court below has decided an important question of Federal Law which must ultimately be decided by this Court in the matter of treatment to be given to the acts and decrees of the Baltic States of the Soviet Union subsequent to June 17, 1940.

On June 17, 1940 the Russian Army reoccupied the three Baltic States of Estonia, Latvia and Lithuania, and restored these three provinces of Russia to the mother country. They had been dismembered from Russia by force in 1918, by the Germans, and had maintained a brief

and precarious independent existence for about twenty years, after nine centuries of almost continuous status as part of the Russian State.

The pretended independence of the Baltic States became more and more a myth as they moved more completely into the Nazi orbit. In 1934 Premier Karlis Ulmanis declared himself Dictator of Latvia and the Nazis proudly hailed him as "Fuehrer Premier Ulmanis" [Prof. Edgar Tatarin Tarnheyden, Archiv des Offentlichen Rechts Neu Folge 26 band 3 Heft 1935, p. 264].

One year later Estonia followed suit by a decree abolishing political parties (Encyclopedia Brittanica, Estonia, 1942 Edition), and the situation was accurately appraised by the Soviet Union as follows:

> "During the last years of their existence the Governments of Latvia, Lithuania, and Estonia showed by all their behaviour that they were prepared to aid Hitler in every way, and to make it easy for him to seize the Baltic States." ("The Soviet Union, Finland and the Baltic States," published in 1941 by the Soviet Information Bureau, Coop. Ptg. Soc. Ltd. Tudor St. Ecy, London, England.)

The Russian occupation of these provinces as a means of restoring them to the Russian mother country on June 17th, 1940, therefore, came none too soon to prevent them from being used actively as invasion bases against Russia one year later.

Our State Department, with the same fine sense of unreality which distinguished its attitude toward the Kerensky Government from 1917 to 1933, has refused to recog-

nize these States of the Soviet Union diplomatically. This does not alter the fact, however, that those States have issued a number of decrees, and conducted public business as *de facto* governments steadily since that time as members of the Russian Federation of Republics. The Court, therefore, must decide these questions "just as it would decide other judicial questions, without advice or suggestions from the political branch of the Government." (*Anderson* v. *N. V. Transandine etc.*, 299 N. Y. 9, 43 N. E. 2d 502 (1942).

While Estonia S.S.R. is presently overrun by German arms again, its status as a part of the Soviet Union is definitely fixed by official statements of the Russian government (Pravda *supra.*)

A large number of legal questions will most likely be presented in American Courts regarding the acts and decrees of these governments.

The instant case presents one of these issues in concise and direct form. The writ of certiorari should be granted herein, therefore, as a means of fixing these rights and establishing now the legal as contrasted with the political status of these *de facto* Baltic States of the Russian Government.

CONCLUSION

For the reasons above stated, therefore, libelant respectfully urges that the petition for certiorari in the instant case should be granted.

Dated, May , 1943.

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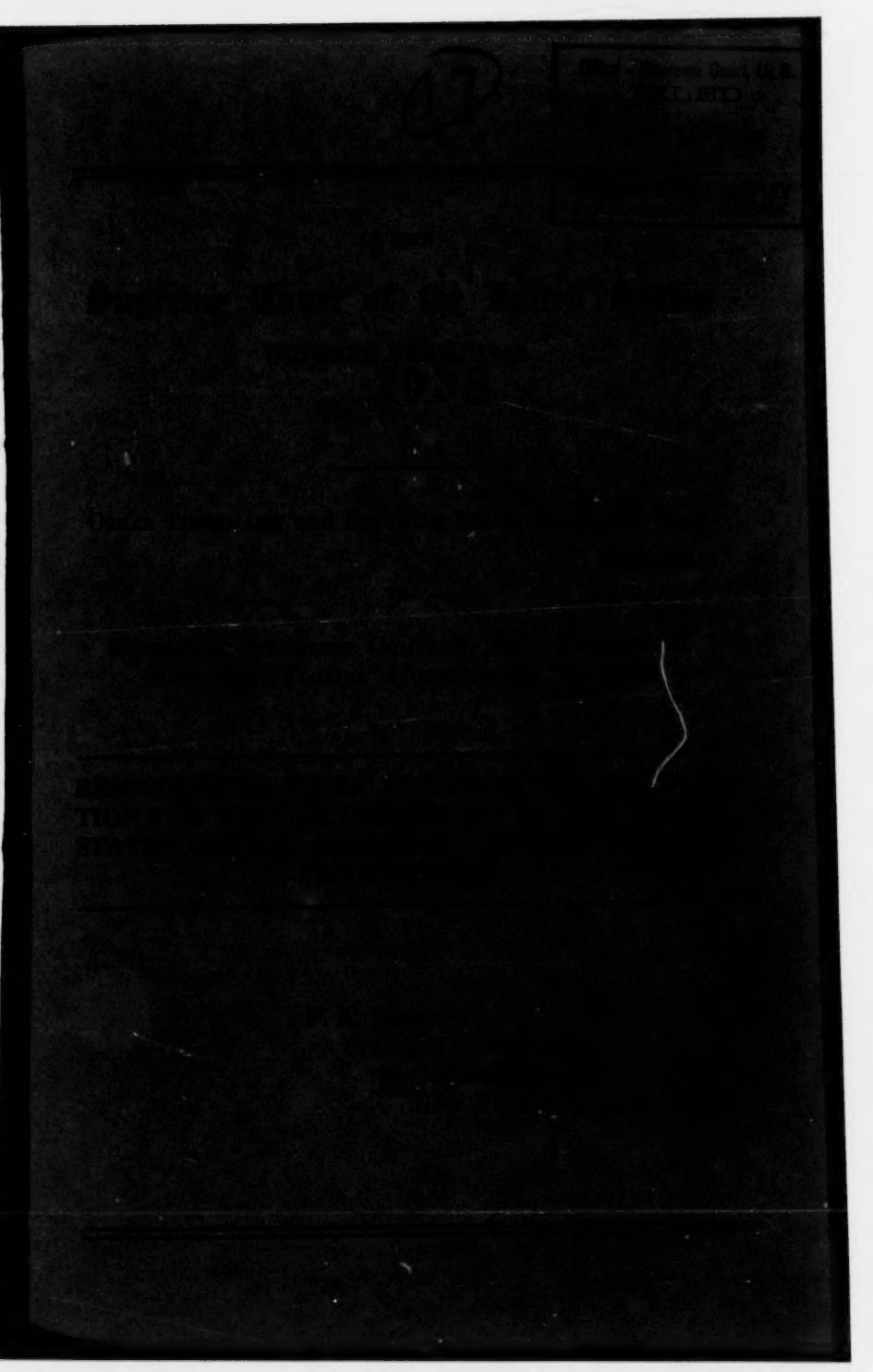

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CASES CITED IN PETITIONER'S BRIEF REFERRED TO HEREIN

CASES CITED HEREIN

AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. .....

OSKAR TIEDEMANN and ESTONIAN STATE STEAMSHIP LINE,

Petitioners,

vs.

ESTODURAS STEAMSHIP COMPANY, INC., Claimant of Steamship "FLORIDA" (formerly the "SIGNE").

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Summary Statement of the Matter Involved

This statement is made for the purpose of correcting and amplifying the statement made by petitioner on page 2 of his petition.

Estonia, formerly under the sovereignty of Sweden, became a province of Czarist Russia following the conclusion of the Thirty Years' War which was ended by the Treaty of Nystad, 1721 (Estonia, pp. 67, 68, by J. Hampden Jackson—1941). While it is true that under the Treaty of Brest-Litovsk, concluded between Russian and Germany in

March, 1918, the Baltic States and part of Poland were wrested by Germany from Russia, it is also true that the people of the Baltic States were not consulted in the formulation of this Treaty. The effectiveness of the Treaty depended upon the success of Germany in World War I and by Germany having lost that war and the renunciation of the Brest-Litovsk Treaty by Russia on November 13, 1918, the Treaty had no effect in the establishment of the independent Republic of Estonia. The Republic was established and separation from Russia accomplished by the Treaty of Tartu, February 2, 1920 (Estonia, p. 284, Malbone W. Graham, University of California Press, 1939). Thereafter a constitution was adopted and a parliamentary government formed which continued to the 17th of June, 1940, when Estonia was invaded by the armies of Soviet Russia, its government overthrown and a Sovietized Communistic government established. This government decreed the nationalization of shipping property on July 28, 1940 (Respondent's Exhibit 5, received Record p. 105, printed 300). On August 6th a petition for admission into the Union of Soviet Socialist Republics was made. This petition was granted and on or about August 8th Estonia became one of the constituent republics of the U. S. S. R.

The steamship Florida, ex-Estonian steamship Signe, was a part of the Estonian merchant fleet included in the nationalization decree of July 28th. The new government ordered the master by wireless to take the ship to Murmansk (Respondent's Exhibit 22, received Record p. 208, printed 333). The new government also provided severe punishment for masters who refused to take their ships to Murmansk and members of their families were to be held responsible for the master's failure to take his ship to Murmansk (Respondent's Exhibit 6, received Record p. 106, printed 305). While the Signe was in New Orleans a libel for possession was filed on December 21, 1940, by Mr. Charles Recht allegedly on behalf of Oskar Tiedemann and some thirty-five Estonian citizens who were the owners

of the ship. On or about the 12th day of June, 1941, an intervening libel was filed by Mr. Charles Recht on behalf of Estonian State Steamship Line, a corporation of the U. S. S. R. organized for the purpose of taking title and possession of the Estonian merchant fleet.

At the time of the invasion and annexation of Estonia the United States State Department denounced this aggression against a small sovereign nation (State Department Bulletin, July 27, 1940, Baltic Republics—Statement by Acting Secretary of State, Mr. Welles) and refused to recognize the Soviet government established in Estonia (Respondent's Exhibit 3, received Record p. 94, printed 298) recognized the representative of the former independent government of Estonia, Hon. Johannes Kaiv, Acting Consul General and Chargé d'Affaires (Respondent's Exhibit 1, received Record p. 91, printed 272). The United States State Department has not altered its position in respect to any of these matters to this date.

The trial in the District Court resulted in dismissal of both the libel and intervening libel. Whereupon the steamship Signe was returned to the possession of those in possession at the time the libel was filed and the ship left the jurisdiction of the District Court without the posting of a supersedeas bond by the petitioner herein.

There is no finding of fact by the Court below that the regime set up in Estonia under the aegis of the Russian government was a de facto government, nor is it conceded in any of the pleadings that such regime was a de facto government as stated in note 2 on page 3 of libellant's petition.

The statements in the petition relative to the jurisdiction of this Court will not be answered by way of further factual statement as each of the contentions are made a point in petitioner's accompanying brief. The points made in petitioner's brief will be answered seriatim as designated by the petitioner.

POINT I

(p. 11, Petitioner's Brief)

The decision below is not in conflict with that of the Circuit Court of Appeals of the Third Circuit in *The Denny,* 127 Fed. (2nd) 404. The part of that opinion quoted on page 12 of petitioner's brief is strictly obiter dictum. The real basis of that decision is to be found on page 409 of the report, where, after reviewing the testimony on the question of duress, the Court said:

> "The competency of the evidence is extremely questionable and in our opinion falls far short of justifying the fact finding that the powers of attorney were given under duress."

The Court accordingly held that the powers of attorney to Mr. Recht were not invalid on that ground.

POINT II

(p. 13, Petitioner's Brief)

The decision of the Court below does not depart from any course of judicial proceeding in the United States Courts. The case of *U. S.* v. *Belmont,* 301 U. S. 324, cited on page 13 of petitioner's brief, was a decision after recognition of Russia by the United States government. The same can be said of *U. S.* v. *Pink,* 315 U. S. 203, cited and quoted on page 14 of petitioner's brief. In the present case we are dealing with the government of Estonia, established in that country after the invasion by the Russian army and which government was subservient to the government of the U. S. S. R. This government thus established has not been recognized by the United States.

POINT III

(p. 14, Petitioner's Brief)

All of the decisions cited in petitioner's brief under this point without exception were made in cases involving property within the territorial and physical jurisdiction of the de facto government. The property involved in the case at bar was never in the geographical and physical jurisdiction either of the unrecognized Estonian government or of that of the government of the U. S. S. R. It is, therefore, to no purpose to refer individually to the long list of cases cited on pages 15 and 16 of petitioner's brief. Since, however, the case of *Salimoff* v. *Standard Oil*, 262 N. Y. 220, was singled out as deserving of special mention and citation, respondent points out that this case involved title to certain oil purchased in Russia and delivered in Russia to Standard Oil Company. It involved the acts of an unrecognized government only within its own territorial jurisdiction; whereas, the steamship Florida, ex-Signe, was never within the territorial jurisdiction of the unrecognized government involved. The *Salimoff* case has no application to the case at bar.

The case of *U. S.* v. *Pink*, also cited and quoted from on page 17 of petitioner's brief, is a case arising after de jure recognition of the Russian government.

POINT IV

(p. 18, Petitioner's Brief)

There is no merit in this point for three reasons:

1st: That the testimony sought to be adduced by the deposition was to be given in Moscow where the witness would have been subject to the duress of the aggressor nation. Testimony so given is not admissible.

2nd: The treaty between the United States and Estonia provides for the manner of taking testimony by deposition for use in American Courts. To have compelled the taking of the testimony of the witness Tiedemann would have been a contravention of that treaty.

3rd: The method of taking depositions in Russia is governed by the Bullitt-Litvinoff Exchange of Notes (November 22, 1935), which provided among other things that depositions must be forwarded by the State Department. The State Department could not and would not have forwarded this deposition to Russia because the State Department refused to recognize the annexation of Estonia by Russia. Furthermore, the application for letters rogatory was not made in good faith as the claimant and respondent below consented to the taking of the testimony of O. Tiedemann provided testimony were taken in Finland or Sweden or other neutral country where he would not be subject to intimidation or duress of the aggressor nation, without expense to the libellant, and claimant offered to bring the said witness to the United States to testify in open court at claimant's expense, but both these propositions were refused by the libellant; no doubt advisedly so, because the witness could then testify freely and without restraint.

POINT V

(p. 19, Petitioner's Brief)

The case of the *Bello Corrunes,* 6 Wheat. 152, 1821, does not sustain this point. The part from the opinion of that case quoted on page 20 is obiter dictum as that case involved only the right to appear and not the right to receive property. However, the Consul General in the case at bar is within the *dictum* of that case as he has the "specific powers" mentioned, under the Estonian law, particularly the principle of law in effect in that country known as negotiorum gestor, which being a principle of the civil law is a part of the law of Louisiana.

In *Vujic* v. *Youngstown Sheet & Tube Company,* 220 Fed. 390, D. C., N. D. Ohio, 1914, the question was whether the Consul General of Austria-Hungary was the proper person to receive payments under the Compensation Law of Ohio on behalf of his nationals without special authorization or power of attorney from them. The Court reviewed the provisions of the laws of Austria-Hungary, particularly those relating to the duties of Consuls, and found that under the law Consuls were empowered to receive such payment without special authorization.

POINT VI

(p. 20, Petitioner's Brief)

Under this point petitioner's counsel assumes that the Baltic States, particularly Estonia, will hereafter remain a member of the U. S. S. R. and that the United States government will recognize the aggression perpetrated by Russia on Estonia in 1940, and cites the Soviet organ Pravda to that effect. However, if one is to speculate on the future status of the Baltic States the denunciation of the Russian aggression on the Baltic States by Acting Secretary of State Mr. Welles, published in the State Department Bulletin, July 27, 1940, the Atlantic Charter, particularly the second and third paragraphs thereof, the fact that the budget of the United States government for the fiscal year ending June 30, 1944, makes provision for the payment of Ministers' salaries to the three Baltic States, and the declaration of the United Nations to which Russia is a party, published in the Department of State Bulletin for January 8, 1943 (p. 21), furnish a more solid foundation for speculation to the opposite.

The cases cited on pages 22 and 23 of petitioner's brief are cases on the equity side of the Court. This is a case in the admiralty and the admiralty has no equitable jurisdiction. The cases, therefore, are not in point.

POINT VII

(p. 24, Petitioner's Brief)

It is submitted that the documentary evidence by way of decrees of the unrecognized government of Estonia, together with the other testimony adduced at the trial, fully sustains the finding of the Court that the libellant Tiedemann signed his power of attorney to Mr. Recht under duress. This point assumes that the basis of this finding is entirely in the oral testimony at the trial, whereas the decrees as published in the Official Gazette of the new government were placed in evidence and furnish full and adequate proof of duress.

POINT VIII

(p. 25, Petitioner's Brief)

The only title asserted by the intervening libellant, Estonian State Steamship Line, was the nationalization decrees and the decree of the U. S. S. R. authorizing the formation of the intervening libellant corporation for the purpose of taking title to nationalized ships. Since the decrees of an unrecognized government cannot affect property outside the territorial jurisdiction of the government, the lower Court rightly held that there was no proof of ownership in the libellants.

POINT IX

(p. 25, Petitioner's Brief)

It is respectfully submitted that the State Department rather than this or any other Federal Court is the final authority on the effect of events relative to the status of

foreign States and that until the State Department has spoken otherwise this Court is powerless to act and by denying the petition leaves the property involved where the lower Court found it.

CONCLUSION

The petition for certiorari should be denied.

Dated, New York, N. Y., June 9, 1943.

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